80-726

No.

Supreme Court, U.S.
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

IN THE MATTER OF

JOHN W. YENGO, ESQ. Charged with Contempt,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of United States

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF ISSUES INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT—The court should deny the petition for writ of certiorari because the determination of the Supreme Court of New Jersey concerns solely the proper scope of New Jersey Court Rule 1:10-1 and thus does not present any important far-ranging issues or conflicts with federal decisions and because it properly concludes that petitioner's unauthorized, disruptive absence for a four-day weekend trip to Bermuda in direct contravention of the trial court's orders was punishable by summary contempt	5
CONCLUSION	12

Cases Cited

Allis, In re, 531 F.2d 1931 (9th Cir. 1976)	7, 10
Clawans, In re, 69 N.J. Super. 373(App. Div. 1961), certif. den. 36 N.J. 296 (1962), cert. den. 370 U.S. 905 (1962)	7
Cooke v. United States, 267 U.S. 517 (1925)	9
Chula v. Superior Court, 57 Cal. 2d 199, 368 P.2d 107, 118 Cal. Rptr. 507 (Sup. Ct. 1962)	7
Ex parte Terry, 128 U.S. 289 (1888)	5
Gates, In re, 478 F.2d 998 (D.C. Cir. 1972)	7
Harris v. United States, 382 U.S. 162 (1965)	6

PAGE

Jessup v. Clark, 490 F.2d 1068 (3rd Cir. 1973) 7

Levine v. United States, 362 U.S. 610 (1960) 10, 11

McAllister v. McAllister, 95 N.J. Super. 426 (App. Div. 1967) 6

Niblack, In re, 476 F.2d 930 (D.C. Cir. 1972) 7

Offut v. United States, 348 U.S. 11 (1954) 6

Oliver, In re, 333 U.S. 257 (1940) 6

Peltier v. Peltier, —— R.I. ——, 388 A.2d 22 (Sup. Ct. 1978) 11

Richmond Newspaper Inc. v. Commonwealth of Virginia, 448 U.S. ——, —— (1980) 10

State v. Dias, 76 N.J. Super. 337 (App. Div. 1962) 7

State v. Sax, 139 N.J. Super. 157 (App. Div.), certif. den. 70 N.J. 525 (1976) 6

Taylor v. Hayes, 418 U.S. 488 (1974) 10

United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973) 7

United States ex rel Laws v. Yeager, 448 F.2d 74 (3rd Cir. 1979), cert. den. 405 U.S. 976 (1972) 10

Yengo, In re, 84 N.J. 111 (1980) 6

United States Constitution Cited

Fifth Amendment 1

Sixth Amendment 1

Fourteenth Amendment 1

PAGE

Rules Cited

FRCrP:

42(a) 6, 7

Rule 1:10-1 ..... 4, 7, 11

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BRIEF IN OPPOSITION

Counter-Statement of Issues Involved

Did the exercise of the summary contempt power by the State trial court violate the Fourteenth, Fifth and Sixth Amendments of the United States Constitution when in the middle of a complex criminal conspiracy/wiretap trial petitioner absented himself for a four-day weekend trip to Bermuda in direct intervention of the court's orders where the absence had an immediate disruption upon the trial proceedings, where at the time of the absence the location of counsel was made known to the trial court,

where petitioner was offered on two occasions an opportunity after notice to explain or defend his actions and where petitioner never objected to the proceedings?

Counter-Statement of the Case

This case involves application of the summary contempt authority of a New Jersey trial court where a defense attorney absented himself during the middle of a complex criminal trial for a weekend trip to Bermuda without authorization and in direct contravention of court orders. Petitioner, at the time of the contempt proceeding involved herein, represented one of ten defendants in a complex wiretap, gambling and conspiracy case. It was anticipated that the trial would last for five weeks and that the selection of 18 jurors would be required (Aa47 to Aa40).* Accordingly, the trial was peremptorily scheduled for February 6, 1978. Because of weather conditions, however, courts were closed February 6 and 7. In an effort to assure prompt and efficient movement of the trial, the trial court on February 8 directed all attorneys involved in the case to clear their calendars of all other matters and not to become involved with any other matter without prior approval of the court (Aa48, 1T8-22 to 1T9-6,** 3T3-8 to 11).

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* As used herein, Aa— refers to the appendix filed by petitioner Yengo with the Appellate Division of the Superior Court of New Jersey which appendix was also filed with the Supreme Court of New Jersey.

** The various portions of the transcripts which are cited herein are located in the appendices filed by both petitioner Yengo and respondent State of New Jersey with the Appellate Division of the Superior Court of New Jersey and which were also filed with the Supreme Court of New Jersey.

Petitioner Yengo was fully aware of this requirement (Aa48, 3T3-8 to 10). On February 14, 1978 all attorneys were once again instructed that when the trial began they must appear punctually every day of the trial and were fully warned by the trial court that failure to abide by her directives would result in the imposition of sanctions (2T2-15 to 2T3-22) (Pet. App. 3a to 6a).

By February 17, 1978, an 18 member jury was chosen and the trial commenced and continued during the weeks of February 20 and 27. On the ninth day of the trial, March 2, 1978, petitioner did not appear to represent his client. He had not previously advised the court of his intended absence (Aa49). Although petitioner requested his young associate to cover for his client, he had not given that attorney the file until 11 P.M. the previous night (Aa49). The only prior contact his associate had with the case had occurred several weeks earlier during plea negotiations (Aa17, T1-10 to 13) (Pet. App. 6a to 8a).

The unfamiliarity of this attorney with the complex wiretapping, gambling and conspiracy case so concerned the trial judge that she made extensive efforts to contact petitioner in order to direct him to immediately return to the court (Aa51). Petitioner's associate indicated that petitioner was out of the country, but he did not know where (Aa50). Calls to petitioner's answering service were to no avail (Aa50). The trial court was able to contact petitioner's daughter who advised the court that petitioner had gone to Bermuda on a four-day business trip (Aa51). The trial continued on March 2 and March 3, with petitioner absent both days (Aa52) (Pet. App. 6a to 8a).

On March 3, 1978, the trial court sent a telegram to petitioner directing him to appear before her on March 6 (Aa52). He appeared before the court on that day and was afforded an opportunity to explain his absence on

March 2 and 3. His excuse was simply that he had not felt it necessary to advise the court of his intended trip to Bermuda and his resulting unavailability (Aa52) (Pet. App. 9a).

Finding that petitioner's unauthorized absence in direct contravention of a court directive disrupted the court proceedings, constituted a lack of respect for the court and conduct prejudicial to the administration of justice, the trial court found petitioner guilty of contempt in the presence of the court pursuant to R. 1:10-1. Thereafter, petitioner was directed to appear on April 14 for sentencing on the contempt citation (6T4-11 to 12). On that date, petitioner was again offered an opportunity to explain his failure to appear in court on March 2 and 4 (Aa41). He did not object to the matter proceeding summarily or request that it be referred to another trial judge. On April 21, 1978 the trial court filed a certification, required pursuant to New Jersey Court Rule 1:10-1, and entered an order holding petitioner in contempt of court *in facie curiae* and imposing a fine of $500 (Aa47 to Aa44) (Pet. App. 10a to 11a).

Petitioner appealed to the Appellate Division of the Superior Court of New Jersey. Apparently concluding that an attorney's absence can never constitute contempt in the presence of the court, the Appellate Division of the Superior Court of New Jersey reversed the trial court's order. Thereafter on petition for certification to the Supreme Court of New Jersey, the Supreme Court affirmed the finding of contempt. Recognizing that both federal and State law authorized the use of summary contempt only where the contempt occurs in the presence of the court (Pet. App. 16a to 18a), the court upheld the exercise of contempt upon the particular facts of this case, noting that petitioner's explanation for his absence was frivolous

and that "[h]is unexcused absence was egregious when viewed against the background of a multiple defendant criminal gambling conspiracy case and the admonitions of the trial judge" (Pet. App. 32a to 33a). This petition for writ of certiorari followed.

ARGUMENT

The court should deny the petition for writ of certiorari because the determination of the Supreme Court of New Jersey concerns solely the proper scope of New Jersey Court Rule 1:10-1 and thus does not present any important far-ranging issues or conflicts with federal decisions and because it properly concludes that petitioner's unauthorized, disruptive absence for a four-day weekend trip to Bermuda in direct contravention of the trial court's orders was punishable by summary contempt.

This case involves a determination by a trial court of New Jersey during a complex criminal trial that summary contempt proceedings pursuant to the New Jersey Court Rules were appropriate to control action by a defense attorney which was disruptive and in direct contravention of the court's orders. The decision of the Supreme Court of New Jersey in affirming the exercise of the summary contempt was well grounded in the particular facts of the case and does not raise any important or compelling reason which would justify review by the court.

It is unquestioned that the power to punish summarily for contempt is inherent in the nature of the courts. *Ex parte Terry,* 128 U.S. 289 (1888). "The pith," this court has observed,

> ". . . of this rather extraordinary power to punish without the formalities required by the Bill of Rights for prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstruction to it. It is a mode of vindicating the majesty of law, in its active manifestations, against obstruction and outrage. . . ." *Offutt* v. *United States,* 348 U.S. 11, 14 (1954).

Because the full panoply of procedural due process rights are not applicable to the exercise of summary contempt, it is reserved "for exceptional circumstances." *Harris* v. *United States,* 382 U.S. 162, 164 (1965); *In re Yengo,* 84 N.J. 111, 122 (1980) (Pet. App. 17a). Thus it has been held that the contemptuous conduct must have occurred in the presence of the court such that no further evidence need be adduced and that the act must impact adversely upon authority of the court. *In re Oliver,* 333 U.S. 257 (1940); *In re Yengo, supra* (Pet. App. 16a).

The actual boundaries, however, defining the type of disruptive conduct occurring in the presence of the court which justifies summary contempt, have been imposed by statute, pertinent court rules and applicable case law. Thus, for instance, while some federal courts may have concluded that pursuant to FRCrP 42(a) conduct which does not occur directly in the presence of the court cannot be punished summarily, New Jersey courts have not so limited the scope of New Jeresy Court Rule 1:10-1. Such conduct in New Jersey need not be directly seen or heard. *State* v. *Sax,* 139 N.J. Super. 157 (App. Div.), certif. den. 70 N.J. 525 (1976); *McAllister* v. *McAllister,* 95 N.J. Super. 426 (App. Div. 1967). Prior to the Supreme Court's decision at issue here, New Jersey Court Rule 1:10-1 had been construed to extend to an attorney's failure to appear in

court. *State* v. *Dias,* 76 N.J. Super. 337 (App. Div. 1962); *In re Clawans,* 69 N.J. Super. 373 (App. Div. 1961), certif. den. 36 N.J. 296 (1962), *cert.* den. 370 U.S. 905 (1962). See also *In re Gates,* 478 F.2d 998 (D.C. Cir. 1972); *In re Niblack,* 476 F.2d 930 (D.C. Cir. 1972); *Chula* v. *Superior Court,* 57 Cal. 2d 199, 368 P.2d 107, 118 Cal. Rptr. 507 (Sup. Ct. 1962).*

The decision in this case, therefore, is grounded upon the particular facts and New Jersey Court Rule 1:10-1, not upon any principles of constitutional law. Given these facts the conduct was properly found to be within the scope of the summary contempt power authorized by the New Jersey Court Rule. At the time of petitioner Yengo's absence, the trial court knew of its own senses: a) that all attorneys involved in the lengthy, complex trial had been ordered to be ready to proceed with the trial and not to engage in any other activity with a warning that failure

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* Petitioner's reliance upon contrary federal decisions in an effort to demonstrate the existence of a substantial conflict on an issue of constitutional importance is misplaced. While there are cases reaching a conclusion that attorney absences or tardiness cannot be punished summarily, *e.g., In re Allis,* 531 F.2d 1931 (9th Cir. 1976), *Jessup* v. *Clark,* 490 F.2d 1068 (3rd Cir. 1973), *United States* v. *Delahanty,* 488 F.2d 396 (6th Cir. 1973), those cases arise under FRCrP 42(a). This case concerns the scope of summary contempt under the particular court rule applicable in New Jersey. In this respect, it should be noted that while FRCrP 42(a) authorizes summary contempt if the court "saw or heard" the conduct, New Jersey Court Rule 1:10-1 refers to contempt "in the actual presence of the court." Moreover, the facts in the cases relied on by petitioner are distinguishable. In *Jessup,* for instance, the Court of Appeals for the Third Circuit found, contrary to this case, that no disruption occurred and in *Delahanty* the Court of Appeal for the Sixth Circuit found the conduct involved not contemptuous. Here, not even petitioner denies that his conduct was contemptuous.

to abide by the order would result in sanctions;* b) that petitioner knew of this directive as evidenced by his earlier request that the trial court advise another trial court of his commitment; c) that petitioner had left for a four-day weekend trip to Bermuda; d) that petitioner's absence was unauthorized; and e) that petitioner's absence caused considerable disruption and an additional expenditure of the court's time, not to mention the time of the jurors and other attorneys.

In contrast to the federal cases relied upon by petitioner, the absence in this case was disruptive. Although petitioner had requested his associate to cover for him, his associate's only contact with the case occurred several weeks earlier during plea negotiations and a 15 minute conversation with petitioner the night before. Because of his associate's unfamiliarity with the case, petitioner's absence posed a potential prejudice to the parties in the trial, particularly his client, and resulted in the time-consuming, exhaustive efforts by the court to locate petitioner and to assure herself of his associate's ability to adequately represent petitioner's client. Although the trial court allowed the trial to continue with petitioner's client represented by his associate, the trial would have had to have been adjourned if the State's expert had taken the stand, scheduled to occur on the second day of petitioner's absence (Aa51). Further, as noted by Justice Handler in his con-

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* In Point V of his petition, petitioner suggests that the permission granted other attorneys to have co-counsel cover for them on several occasions removes the contemptuous nature of his conduct. While the record does indicate that the court authorized attorneys to cover for each other on a few occasions, the "cover" was for usually a few minutes, never more than a half-hour and was necessitated by the weather and travel conditions. In stark contrast is petitioner's four-day vacation trip to Bermuda. Petitioner cannot seriously contend that these short periods of "cover" reasonably led him to believe that an extended weekend trip to Bermuda would be authorized.

curring opinion, the "admixture" of conspiracy, gambling and wiretapping offenses created for the court "especially complex and unsual trial problems" raising "special concerns for the trial judge as to attorney conduct" (Pet. App. 34a). Since petitioner's punctual appearance would be required throughout the rest of the trial, it was absolutely necessary for the trial court to immediately impress upon him and the other attorneys in the trial the authority of her directive concerning timely appearances.

Moreover, no evidence was necessary at the time of the unauthorized absence to support a certification that petitioner's behavior was contumacious. Nonetheless, petitioner was afforded on two subsequent occasions an opportunity to demonstrate that the facts as then appeared to the court were not accurate. This petitioner could not do; in fact he simply reaffirmed what had appeared to the trial court at the time of his absence. Under any reasonable interpretation of the law, the facts in this case fully support the application of a contempt *in facie curiae* pursuant to New Jersey Court Rule 1:10-1.

Even where summary contempt is not the appropriate procedure,

> "The exact form of the procedure in the prosecution of such contempt is not important . . . 'all that is requisite to their validity is that, when not taken for matters occurring in open court, notice should be given to the attorney of the charges made, an opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted so that it be without oppression or unfairness, is a matter of judicial regulation.'" *Cooke* v. *United States,* 267 U.S. 517 (1925).

In the present case, these requirements of due process were fully met. Petitioner was offered two opportunities

to provide a defense or explanation. While he might not have had detailed notice of the nature of the proceeding on the first occasion, he did thereafter. See *In re Allis,* 531 F.2d 1391 (9th Cir. 1976) (10 minute recess to give counsel opportunity to obtain a lawyer and prepare a defense was sufficient due process protection).*

In Point IV of his petition, petitioner urges that the *"in camera"* nature of the proceedings violated an asserted right to a "public" trial pursuant to the Sixteenth Amendment. The sole support for this contention is *In re Oliver, supra.* The contempt order at issue in that case occurred, however, during the course of a secret grand jury proceeding. In contrast, the proceedings in this case were held in open court, albeit with the court cleared for petitioner's own protection. Regardless of the extent of the asserted right to public trial, it has consistently been held that such right is not absolute and that trial courts possess discretion to remove the public from the courtroom. *Richmond Newspaper Inc.* v. *Commonwealth of Virginia,* 448 U.S. ——, —— footnote 18, (1980); *United States ex rel Laws* v. *Yeager,* 448 F.2d 74, 80 (3rd Cir. 1979), *cert.* den. 405 U.S. 976 (1972). See *Levine* v. *United States,* 362 U.S. 610 (1960). It can hardly be contended that the trial court's efforts to protect the integrity of petitioner by clearing the court was abusive.

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* In Point III of his petition, petitioner suggests that an additional requirement of procedural due process is that the summary contempt proceedings occur before a different judge. While it has been suggested that it might be better practice to do so, it is not a constitutional requirement unless the trial court becomes so embroiled in the matter that he can no longer retain an objective perspective. *Taylor* v. *Hayes,* 418 U.S. 488 (1974). No such contention has ever been raised in this case.

Finally, it must be noted that this case is not an appropriate vehicle for consideration of the constitutional issues raised by petitioner. At no time during the proceedings before the court did petitioner ever request any of the rights he now seeks here. Like the attorney in *Peltier* v. *Peltier,* —— R.I. ——, 388 A.2d 22 (Supreme Court 1978), the petitioner voluntarily appeared on March 6 and provided to the court his explanation. Even if it could be said that any waiver at that time was not knowing, certainly during the second proceeding in April he had sufficient time to determine whether any of his constitutional rights should be raised. This he did not do and therefore waived whatever rights he might have had. *Peltier* v. *Peltier, supra,* 388 A.2d at 24. See *Levine* v. *United States, supra.*

In sum, then, while constitutional considerations of due process require that the summary contempt power be sparingly used, the exercise of that power in this case pursuant to New Jersey Court Rule 1:10-1 was appropriate. Contrary to petitioner's assertions, therefore, the validity of the trial court's action in punishing petitioner for his unauthorized disruptive four-day trip to Bermuda does not entail broad issues of due process rights. Further, the assertions of Sixth Amendment violations are insubstantial. Finally, petitioner never objected to any constitutional improprieties . Accordingly, this case does not present issues of broad public importance or of substantial constitutional dimensions warranting this court's review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 19, 1980